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Washington, D.C. 20505

21 March 1979

MEMORANDUM FOR: David Aaron
Deputy Assistant to the President
for National Security Affairs

SUBJECT: Comments Concerning 7 March Working
Group Draft

1. Your memorandum of 14 March requested our comments concerning the 7 March working group draft of statutory provisions governing collection of foreign intelligence that concerns United States persons.

2. I am in full agreement with the opinion of the Attorney General, expressed in his 22 February 1979 letter to you, both as to his recollection of the conclusions arrived at by the SCC and his view of the undesirability of requiring a judicial warrant as a predicate for "placing" employees in U. S. organizations for the purpose of collecting foreign intelligence. Notwithstanding the contrary indications in the minutes of the 22 February meeting, it was my clear understanding that the SCC members were in agreement that Attorney General approval would be a sufficient authorization for such activities. A warrant procedure would have several unfortunate consequences. It would involve the judicial branch in an undue and inappropriate manner in the planning and execution of an executive branch function. It would extend the protections of the Fourth Amendment, which of course relates to unreasonable searches and seizures, into an area of activity never before thought to be within the scope of these protections, let alone subject to a warrant requirement. The Church Committee did not recommend such a requirement, and even S. 2525 did not include such a requirement among its many proposed restrictions. Advocating such a requirement would only add further momentum to the current tendency to take from the executive branch and give to the other branches of government. Further, there would be a risk of distortion of the judicial, as well as the intelligence, function. A judge would essentially be approving and controlling the use of informants in the

ATTACH-
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U. S. by the FBI. The implications of this novel judicial role in the management of investigations, and the potential for damage to the public perception of the judiciary if and when, for example, an informant becomes a center of controversy, are not clear but should not be easily dismissed. Finally, the effect of involving the courts in what are essentially operational decisions could be badly damaging both to the Agency's activities abroad and to the willingness of foreign intelligence services to cooperate with CIA.

3. On another, but related, matter, we are opposed to any bar on "placing" employees in U. S. "political" organizations. There are severe and perhaps insoluble definitional problems associated with a restriction couched in these terms, and such a restriction, if not carefully defined, could become a bar on all such activities in relation to any sort of organization. For example, would not entities such as the Iranian Students Organization, the Palestine Liberation Organization and the Symbionese Liberation Army be "political" organizations and, if locally composed of United States persons, be immune to such collection efforts? Such a bar is unnecessary in any event since, as drafted, the statutory provisions would require the Attorney General to take particular care to prevent interference with political rights. (Sections 210b(6) and c(4).) As an aside, Section 210b(5) could be read to allow the Attorney General to approve "placing" employees in a U. S. organization for only a single period not exceeding 90 days. To avoid that erroneous conclusion, a new subsection patterned upon Section 206e should be added to Section 210.

4. I note that Section 210h would make clear that the restrictions set forth in this section do not apply to undisclosed participation in U. S. organizations for purposes of cover or recruitment of potential sources of assistance, as opposed to collection of foreign intelligence. My understanding is that it was resolved at the 13 February SCC meeting that the types of activities excluded from the reach of Section 210h would simply be authorized and left otherwise unregulated, except at most by a requirement that they be conducted pursuant to procedures approved by the Attorney General. I believe provisions should be added to Section 204 to make these points clear.

5. I understand that an issue may be raised regarding the participation in Section 203i of the Director of National Intelligence in the development of "minimization procedures." If that issue is raised, our position is that the DNI should be a participant in the formulation of such procedures, given

he central coordinating role with which that official is to be charged. In addition, the DNI will have large responsibilities for the quality and production of national intelligence and these procedures will have broad applicability that could significantly affect the ability to carry out those functions.

6. Similarly, an issue may arise as to whether Section 207 should be amended to include ambassadorial approval as a requirement in each and every instance of emergency use of electronic surveillance or physical search abroad that may involve a United States person. We would be opposed to such a requirement since, by their nature, these instances will not lend themselves to delay and multiple levels of approval.

7. I presume that we will be afforded an opportunity to comment on additional issues that may be raised by other agencies prior to the time these issues are resolved or forwarded to the President for resolution. I also believe it would be a mistake to adopt a piecemeal approach and present to the President and then the SSCI the various sets of proposed statutory provisions concerning each issue area treated by the SCC as they are developed and finalized, rather than combining them in a unified statutory proposal. The piecemeal approach could make it much more difficult to gauge the total effect of the restrictions package or to modify positions on various issues that may require change as a result of subsequent deliberations in other areas.

STANSFIELD TURNER

Attachments

Charles R. Babcock

Washington Post Staff Writer

Attorney General Griffin B. Bell yesterday warned that the Carter administration would rather do without a legislative charter for the intelligence community, than accept one with "unnecessary restrictions."

In what was billed as a major policy speech at the CIA, Bell said, however, that he believes Congress would act "responsibly" in drafting charter legislation for the CIA and FBI.

He said the charter-writing business is "as delicate as open heart surgery," and only at the last minute did he drop from his text a reference that said congressional "operating" procedures might kill the intelligence community "patient." Bell's remarks yesterday were being watched closely because of the continuing tense debate, both within the administration and between the executive branch and Congress, over the proper balance the charter should make to protect national security and civil liberties.

The drive for charter legislation grew out of Watergate-era revelations of CIA and FBI spying on American citizens. But over the past year the tone of the charter debate was changed as the administration and Congress have responded to intelligence agency concerns that their hands were being tied by undue restrictions.

For instance, in a speech at Yale University last spring, Bell detailed the abuses of the past and outlined administration steps to protect Americans from a recurrence. He cited an executive order signed by President Carter in January 1978 as the cornerstone of efforts to build a safer intelligence structure.

But then, last month, Bell told a group of top FBI officials he'd "just as soon not have" charters for the CIA or FBI because of fears of restrictions.

In his speech yesterday, Bell said, "If well-balanced charter legislation can be enacted, it would be a truly valuable and historic achievement."

"If the charter process fails, our intelligence community will continue and our regulatory system will remain intact, but there will be a loss."

"Without charters, the climate of suspicion will continue—breeding unfounded conspiracy theories and congressional interference in operational management decisions. Second, this atmosphere will be compounded by continued uncertainty about the law, tending to 'chill' and deter decisionmaking."

Kenneth C. Bass III, whom Bell recently named as head of a new Justice Department office coordinating intelligence policy, said yesterday that the Bell speech was not cleared by the White House, but reflected the Carter administration's current position on the intelligence charter.

"We want the right kind of charter, not just any charter," Bass said. Late last month the administration sent the Senate Intelligence Committee two intelligence charter proposals that already have been criticized as a retreat from the current standards expressed in Carter's own executive order.

One legislative proposal would make it possible for the CIA to conduct small-scale covert operations overseas without the president's direct approval, as is now required. The other would let the CIA spy on Americans overseas in rare cases to collect so-called "positive intelligence" about others, even if the U.S. citizen weren't suspected of any wrongdoing. That proposal would also allow the FBI to infiltrate domestic groups in this country for the same purpose.

Bell did not address such specifics in his speech yesterday. Sen. Walter (Dee) Huddleston (D-Ky.), chairman of the Senate Intelligence subcommittee, which has worked with the administration on both the executive order and the charter legislation, expressed dismay at the proposals last week.

He told National Public Radio that, "We do not intend to lie down and be rolled over by the agencies at this late stage" and give them a blank check to operate as they wish.

Vice President Mondale, a former member of the Senate committee, has strongly opposed the proposals to allow spying on Americans overseas or the infiltration of groups in the United States, according to F.A.O. Schwarz Jr., former committee chief counsel who is still a Mondale adviser.

Schwarz, a New York lawyer, said yesterday that Mondale's position is based on the principle that "We shouldn't be watching Americans overseas or going into groups here if they haven't done anything wrong."

Proponents of the measures emphasize that the intrusive techniques would be used only if the information is considered "essential" and can be gathered in no other way. The proposal also calls for judicial approval of such activity.

The current executive order doesn't require court approval, but it also doesn't permit spying on Americans here or overseas unless they are suspected of being foreign agents.

Jerry Berman, an American Civil Liberties Union lobbyist on the charter, said yesterday that the latest administration proposals "are slipping away from the framework" set up in the executive order.

NEW YORK TIMES

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(EXCLUSIVE: 10 P.M. EDT (EARTH))

ADMINISTRATION SEEKS FREER HAND FOR CIA IN SMALL-SCALE COVERT JOBS

BY RICHARD BURTT

APR. 1979 N.Y. TIMES NEWS SERVICE

WASHINGTON - The Carter administration, after more than a year of intense internal debate, has proposed new legislation that would make it easier for the Central Intelligence Agency to engage in small-scale covert operations abroad, White House officials said Sunday.

The officials said that the new legislation, which was presented to the Senate Intelligence Committee April 20, would allow the agency to undertake some clandestine operations without the president's personal approval and would permit the agency, under special circumstances, to spy on American citizens in foreign countries.

The legislative proposals call for a loosening of current regulations covering CIA activities, officials said, reflecting a growing feeling in government circles that existing constraints have hampered the effectiveness of the agency.

One of the chief proponents of the change is Vice President Mondale, who as a senator was a leading advocate of tightened restrictions on covert action by the agency.

Nevertheless, the White House proposals are likely to face heavy fire from some members of Congress, including Sen. Edward M. Kennedy, D-Mass., who strongly opposes any relaxation of controls on the intelligence agency.

The proposed legislation forms part of the administration's legal charter for the intelligence community, which has been in preparation since early 1977. The charter would regulate approval of covert CIA activities, outline the administration's obligations for reporting them to Congress and specify what operations constitute infringements on individual rights.

Officials said that the proposals represented a careful effort by the White House and other agencies to streamline existing controls on the intelligence agency's activities. But they acknowledged that the proposals would, in effect, give the agency greater leeway in

running out small-scale operations, such as making information available to foreign journalists and providing limited financial aid to political movements abroad.

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SPECIFICALLY, OFFICIALS SAID THE WHITE HOUSE WAS ASKING CONGRESS TO MODIFY THE HUGHES-RYAN ACT OF 1974, WHICH REQUIRES A PRESIDENT TO APPROVE EVERY COVERT OPERATION BY THE AGENCY, LARGE OR SMALL. UNDER THE PROPOSED LEGISLATION, A WHITE HOUSE OFFICIAL SAID, THE PRESIDENT WOULD STILL BE REQUIRED TO APPROVE "LARGE-SCALE" CLANDESTINE ACTIVITIES, SUCH AS GIVING MILITARY AID OR USING AMERICAN FORCES IN FOREIGN CONFLICTS.

THE OFFICIAL SAID THAT THE CIA WOULD NOT BE GIVEN A FREE HAND IN ENGAGING IN SMALL OPERATIONS AND THAT STAFF MEMBERS OF THE WHITE HOUSE'S NATIONAL SECURITY COUNCIL WOULD STILL BE REQUIRED TO PASS ON EVERY COVERT ACTION. HE ALSO SAID THE ADMINISTRATION WOULD STILL BE REQUIRED TO REPORT ITS PLANS FOR COVERT OPERATIONS TO CONGRESSIONAL COMMITTEES.

HOWEVER, IN WHAT THE OFFICIAL SAID WAS AN ATTEMPT TO CUT DOWN ON THE POSSIBILITY OF UNAUTHORIZED DISCLOSURES FROM CONGRESS, THE ADMINISTRATION IS PROPOSING TO REPORT CIA OPERATIONS TO ONLY THE HOUSE AND SENATE INTELLIGENCE COMMITTEES. UNDER CURRENT LAW, THE ADMINISTRATION MUST INFORM SEVEN COMMITTEES OF ITS PLANS FOR CLANDESTINE ACTIVITIES BY THE INTELLIGENCE AGENCY.

THE OFFICIAL SAID THAT THE PROPOSALS WERE DESIGNED MAINLY TO ENABLE THE CIA TO UNDERTAKE COVERT ACTIVITIES IN A MORE TIMELY MANNER, NOT TO WIDEN ITS SCOPE FOR "DIRTY TRICKS." HE ADDED THAT ON SEVERAL OCCASIONS IN RECENT YEARS THE AGENCY HAD BEEN UNABLE TO ENGAGE IN VARIOUS OPERATIONS "SIMPLY BECAUSE A PRESIDENT DIDN'T HAVE THE TIME ON HIS SCHEDULE TO BE BRIEFED AND TO MAKE A DECISION."

DESPITE THIS, THE PROPOSALS HAVE ALREADY STIRRED CONTROVERSY IN THE SENATE INTELLIGENCE COMMITTEE, WHERE CRITICS WARNED THAT THE MOVES WOULD INCREASE CLANDESTINE ACTIVITY AND RAISE THE POSSIBILITY OF NEW ABUSES BY THE INTELLIGENCE AGENCY.

THE MOST CONTROVERSIAL ASPECT OF THE ADMINISTRATION'S PLAN IS ITS EFFORT TO LEGALIZE INTELLIGENCE-GATHERING AGAINST AMERICANS ABROAD. DEFENDING THE PROPOSAL, WHITE HOUSE AIDES SAID THAT SPYING AGAINST AMERICAN CITIZENS WAS "ALMOST NEVER DONE" AND ADDED THAT THE PROPOSED CHARTER WOULD MAKE IT POSSIBLE ONLY IN "EXTRAORDINARY CIRCUMSTANCES."

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ON THOSE OCCASIONS WHERE SPYING ON AMERICANS WAS JUDGED NECESSARY, OFFICIALS SAID, PRESIDENTIAL APPROVAL WOULD BE NECESSARY AND THE GOVERNMENT WOULD HAVE TO OBTAIN A FEDERAL COURT WARRANT TO PROCEED.

SEVERAL SENATORS CONTEND THAT IT IS UNCONSTITUTIONAL FOR THE CIA TO SPY ON AMERICANS UNDER ANY CIRCUMSTANCE. BUT WHITE HOUSE AIDES SAID THEY WERE PREPARED FOR WHAT ONE CALLED "SLOW AND PATIENT DISCUSSIONS" IN AN EFFORT TO BUILD A CONSENSUS ON THE QUESTION.

NY-0429 2025EDT

19 February 1979

Limits Urged to Spying On Americans Overseas

By NICHOLAS M. HORROCK

Special to The New York Times

WASHINGTON, Feb. 18 — As a compromise to resolve the dispute within the Carter Administration over the powers of the nation's intelligence agencies, the Attorney General has suggested giving Americans living abroad some of the civil liberties protections guaranteed them under the Constitution.

In an interview, Attorney General Griffin B. Bell said he was proposing a law that would require the intelligence agencies to get approval of a Federal judge before conducting certain kinds of intrusive surveillance of Americans living abroad. Mr. Bell wants the judge to approve overseas eavesdropping in cases in which an American citizen is not suspected of a crime but possesses valuable national security data that the United States Government wants.

Currently thousands of Americans, including missionaries, businessmen, students and tourists, have no protection from wiretapping, electronic surveillance or other eavesdropping by American intelligence agencies.

Liberals immediately criticized the proposal as not going far enough. John Shattuck of the American Civil Liberties Union said the Government should only be allowed to eavesdrop on Americans if it can show a court evidence they have broken American law.

Mr. Bell said he believed his proposal had broken a logjam within the Administration over comprehensive legislation to govern foreign intelligence gathering. Interviews with several senior intelligence officials indicate that they agree there is new momentum, and a legislative proposal could be ready by spring.

Several Administration sources, moreover, said they believed that the proposals, which would establish charters for the intelligence agencies, would also be closer to legislation now under consideration in the Senate and House intelligence oversight committees.

The Administration and Congress have been trying to prepare a law that would for the first time formally constitute and regulate the nation's intelligence agencies. It would set down the command structure in the intelligence field, divide responsibilities and formalize restrictions against unauthorized covert action abroad, assassination plots and other techniques used in the past by the intelligence services.

But at the center of the debate has always been the power of the intelligence agencies over the lives of Americans.

Several Government agencies collect national security intelligence abroad, including the Central Intelligence Agency, the National Security Agency, the De-

partment of State and, to a lesser extent, the Federal Bureau of Investigation, which collects counterintelligence data.

Since the creation of a comprehensive foreign intelligence apparatus in World War II, these agencies have been virtually unrestricted in their collection methods abroad.

The United States Government films, still-photographs or electronically eavesdrops in virtually every foreign nation. It has also been unrestricted in its intrusions on the communications and contacts of Americans abroad.

Wiretaps and Bugs Used

In some instances Americans were targeted by the National Security Agency; in others the C.I.A. or the F.B.I. directly wiretapped or bugged them or induced the intelligence agencies of other countries to conduct electronic surveillance on Americans.

What Mr. Bell is proposing is a law that would require the intelligence agencies to get the approval of the Federal judge before conducting surveillance that would intrude on the constitutionally protected privacy of Americans abroad. There would still be no restrictions on our collecting intelligence about foreign governments or individuals.

Mr. Bell likens his proposal to the provisions of a law passed last year that regulates domestic electronic eavesdropping in national security cases. Under that law the Government must get a warrant for national security eavesdropping from a special panel of judges.

But there is an important distinction between the 1978 law and the Bell proposal that will be at the core of Congressional debate. In the overseas case, intelligence agencies not only wanted to eavesdrop on Americans who may have committed a crime, they want to listen to Americans who have or have access to what our Government thinks is vital national security data.

Outside Executive Branch

Let us say there is an American working for Aramco in Rome who is not cooperating with our Government but who has important information on oil shipments," a senior American intelligence official suggested, using the Arabian American Oil Company as an example. "The intelligence agencies want to be able to eavesdrop on him and gather that information."

Mr. Bell would require the agencies to persuade a judge in a special closed session that the eavesdropping of the Aramco official is necessary to the national defense. "I want a magistrate to be a third party to the question," Mr. Bell said. "Someone outside the executive

Will Post 3/14/79 Plan Would Let U.S. Spy on Americans Abroad

By Bernard D. Nossiter
Washington Post Staff Writer

A proposal to give U.S. intelligence agencies limited power to spy electronically on any American abroad is being drafted for National Security Council consideration.

The proposed new rule came to light in an American Civil Liberties Union letter charging that it "would even undermine the already far-too-permissive standards" in President Carter's January 1978 executive order to control the intelligence community.

Justice Department aides are drafting the proposed intelligence legislation for consideration by the NSC's Special Coordinating Committee.

The ACLU expressed its protest in a five-page, single-spaced letter from

Director John H. P. Shattuck to Attorney General Griffin B. Bell.

Bell and his aides declined to comment because the criticized proposal is a tentative draft that has not yet received either the approval of the NSC panel or President Carter.

Administration officials have been engaged in a prolonged exercise to write a code of behavior governing spy agencies at home and abroad.

With the Senate Intelligence Committee, they hope to complete a legislative charter spelling out what the FBI, CIA, National Security Agency, and others can and cannot do. Their task is to reconcile agency demands for information with the liberties guaranteed by the Bill of Rights.

The charter draft that drew the ACLU fire would enable the agencies to use wiretaps, Neak In and use other techniques to gain information

regarded as vital from Americans abroad who have committed no crime.

The spy unit would first have to get an approving order from a judge.

Thus, the test to permit these "intrusive" techniques would depend upon the importance of the information and not on the conduct of the citizen spied upon. In contrast, current legislation permitting electronic spying on Americans at home requires a judicial finding that the target is an "agent of a foreign power" who is engaged in activity that may involve a federal crime.

An administration official offered this justification for the proposed departure: an American abroad, acting lawfully, might interview the defense minister of a nation on the edge of war and learn something that diplomats, journalists or the normal run of spies would not pick up. The lawful

American might decline to tell officials what he knows, so they want the power to extract his story anyway. The ACLU protested that wholly innocent Americans could be tar-

geted. Former attorney general Ramsey Clark could have had his hotel room bugged when he met with Iranian Ambassador Khomeini. Members of Congress abroad "could be subjected to intrusive electronic surveillance," the ACLU said. The civil liberties activists felt that the rule could be stretched to cover Americans at home.

A government official said the stringent standards for the information sought would be written into any proposed legislation. In addition, officials would have to certify that the vital nature of the information before judicial permission was sought for the technique.

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The New York Times

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ARTHUR HAYS SULZBERGER, Publisher 1935-1961

ORVILLE D. DEAN, Publisher 1961-1969

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N.Y. Times 5/4/79

Spying on Americans

We've got to get off the back of the . . . C.I.A., says George Bush, the newest Republican Presidential candidate, — and former C.I.A. director. He is not alone. There are many who regard the effort to prevent the abuses and horror stories of recent years as just so much wallowing in Watergate, and harmful wallowing at that. They fear, especially since the upheaval in Iran, that the C.I.A. has been crippled. Stop being so fastidious, they say, we live in a dirty world. More than effective intelligence controls, the nation needs effective intelligence.

But what a primitive choice, why choose? A mature and sensible society should be able to have both. And that is why current rumblings from the Carter Administration are encouraging. For months, it has been struggling to draft an intelligence charter, at last spelling out in law what the C.I.A. and other agencies should and should not do. Some results are being sent to Capitol Hill for reaction. They present choices that are far more constructive than the one urged by Mr. Bush. And far more difficult.

Most of the issues, including proper control of covert action abroad, are likely to be manageable. The truly hard choices center on what is called "positive intelligence," information gathered from unwitting citizens. To take one form, is it permissible to spy on Americans abroad who have done nothing at all wrong but who know something that might be useful to the United States Government? One need only remember the perversions of Watergate to believe the answer should be no. Yet there may be rare cases justifying such spying. The . . .

issued. We will be interested in how well the Administration attests to both the need and the safeguard.

Still harder questions arise from a second kind of positive intelligence. Is it permissible to spy on domestic organizations, like corporations with overseas offices, in order to acquire foreign intelligence? The question should be clearly understood. It does not refer to organizations which volunteer information to the Government or cover jobs for agents. The issue is whether to extract information from American organizations without their knowledge or consent.

The answer may depend on how much one is offended by various techniques. Imagine that an American company trading legally in gold on the London market arouses governmental interest because of the possible effect on the dollar. Should agents in London be permitted to shadow the traders? Interview them under false pretenses? Open their mail? Bug their hotel rooms? Bribe them for information? Should agents be permitted to impersonate the traders? Or even to infiltrate the company, as ostensible employees? Can a line be drawn in this spectrum?

No one yet knows what answers the Administration will recommend; they are still being hotly debated. We hope, with equal fervor, that the answers are all no. There is more at issue than privacy; there is the danger that institutions and corporations of a free society end up serving as, or looking like, instruments of the state. Perhaps a case can be made for keeping the legal door open for rare instances. But as we now weigh the gains against the losses in public confidence in the intelligence . . .

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ROUTING AND RECORD SHEET

SUBJECT: (Optional)

FROM: Anthony A. Lapham
General Counsel

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ER 79-0763/11

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27 April 1979

TO: (Officer designation, room number, and building)

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COMMENTS (Number each comment to show from whom to whom. Draw a line across column after each comment.)

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for SCC mtg on
Charter Legislation
Wed, 2 May, 1600-1730.
15 May 1400